

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

**In re: SUBPOENA FOR INSPECTION
AND SAMPLING OF PREMISES
OWNED BY NON-PARTIES IN THE
MATTER OF:**

**STATE OF OKLAHOMA, et al.
Plaintiffs**

vs.

**TYSON FOODS, INC., et al.,
Defendants.**

Case No. 4:05-CV-00329-TCK-SAJ

**POULTRY GROWERS' RESPONSE IN OPPOSITION TO PLAINTIFF'S
MOTION TO COMPEL DISCOVERY - SUBPOENAS
FOR INSPECTION AND SAMPLING OF PREMISES
OWNED BY NON-PARTIES**

I. INTRODUCTION

Certain non-parties, referring to themselves as Poultry Growers¹ have banded together to oppose heavy-handed regulatory abuses at the Oklahoma Department of Agriculture, Food and Forestry ("ODAFF") and now to oppose equally heavy-handed and burdensome discovery practices by the Plaintiff in the present action. Plaintiff dismissively suggests to the Court that "Each subpoena is clearly not burdensome as it simply requires that the land owner allow access to the property for collection of the samples." Poultry Growers do not agree that the taking of a private citizen's property for a state laboratory is not burdensome because it simply requires that

¹ These non-parties are: Bill R. Anderson; Steve Butler, allegedly d/b/a Green Country Farms; Ren Butler and Georgia Butler; Julie Anderson Chancellor; Roger D. Collins; Franklin A. Glenn and Kenneth D. Glenn and Sondra D. Glenn; Juana Loftin; Larry McGarrah and Priscilla McGarrah; Jim L. Pigeon and Michele R. Pigeon; Joel J. Reed and Rhonda Reed and Caleb Reed and Cory Reed; W. A. Saunders and Bev Saunders; Robert V. Schwabe, II; and David R. Wofford and Robin L. Wofford.

the land owner allow others access to the property for a science experiment. Poultry Growers sincerely hope that this Court is not as dismissive of the legitimate concerns that these non-parties have asserted in their Motion to Quash Subpoenas for Inspection and Sampling of Premises Owned by Non-Parties, or Alternatively Motion for Protective Order (#493). Poultry Growers supplement those legitimate concerns in this Response and ask that the Court deny Plaintiff's Motion to Compel Discovery.

II. ARGUMENT

Poultry Growers who are the recipients of the Rule 45 Subpoenas issued by the Plaintiff hereby respond to Plaintiff's Motion to Compel Discovery by adopting, and incorporating herein by reference, their Reply to State's Response in Opposition to Poultry Growers' Objections and Motion to Quash Subpoenas (#598).

These Poultry Growers also specifically address the statements made in paragraph no. 9 of the Motion to Compel Discovery. In that paragraph, Plaintiff points to the Oklahoma Registered Poultry Feeding Operation Act ("ORPFOA") and its regulations as justification for its proposed sampling, stating: "The method proposed for collection of waste and soil samples by the State is consistent to that which is required by these regulations."² The quoted language is not an accurate statement.³ The number of soil samples which Plaintiff proposes to take with its subpoenas and the analyses proposed are completely different and far more burdensome than those which ODAFF may under appropriate circumstances impose on registered poultry growers. Further discussion of those circumstances follows.

² It is worth noting that several of the Poultry Growers are so referenced for convenience. Ren and Georgia Butler and David R. and Robin L. Wofford are not registered poultry growers.

³ Attached as Exhibit A are the Oklahoma State University bulletins that govern how soil and litter samples are to be taken pursuant to ORPFOA. Attached as Exhibit B are the sampling protocols the Plaintiff is proposing to use on these Poultry Growers' land. They are vastly different: Plaintiff wants to sample for many more constituents, take many more samples and composite them completely differently.

In addition in paragraph 9 of its Motion, Plaintiff attempts to persuade the Court to authorize, without statutory or case law support, extraordinary discovery when it states that “The law and regulations require soil and poultry wastes samples to be obtained.” Poultry Growers disagree and brought a declaratory action in the District Court of Oklahoma County to determine the extent of the authority of ODAFF to carry out the very same discovery now sought. Even more importantly, Plaintiff intentionally misled the District Court of Oklahoma County when it was represented to that Court that the administrative warrants which were sought in October of 2005 had nothing to do with the present case. (See Poultry Growers’ Reply to Response to Motion to Quash, footnote 6, #598) Clearly, they did. And clearly, the declaratory action pending before Honorable Judge Swinton in Case No. CV-2005-8975, has everything to do with any regulatory imprimatur that Plaintiff may claim as additional support for the Subpoenas which are the subject of the pending motion.

In the pending Oklahoma County declaratory action, registered poultry growers Joel J. Reed, Rhonda Reed, Jim L. Pigeon, Michelle R. Pigeon, Kenneth Glenn, Franklin Glenn, Julie Anderson Chancellor and Bill Anderson have challenged the authority of the ODAFF to: (1) compel soil and litter sampling of registered poultry growers’ properties where a third party administrative complaint or an agency notice of violation is not present; and (2) analyze the samples for constituents which are not regulated “nutrients.” (Copy of the Petition for Declaratory Judgment⁴ is attached hereto as Exhibit C.) Plaintiff knows that the challenge exists and is less than candid with the Court when it claims that the challenged authority supports the proposed sampling in this case.

Poultry Growers appreciate Plaintiff’s belated candor in at last admitting that it relies upon the regulatory authority of ODAFF to bolster the inherently burdensome and invasive

⁴ The attachments to that Petition have not been included.

discovery it proposes. Because that issue is currently being litigated, this Court should stay the Plaintiff's request to sample these Poultry Growers' poultry houses and soils until the pending declaratory action case is resolved. As stated by the Tenth Circuit in the case of Crystal Clear Communications, Inc. v. Southwestern Bell Tel. Co., 415 F.3d 1771, C.A.10 (Okla.) 2005, "When a district court applies the doctrine," of primary jurisdiction, "the judicial process is suspended pending referral of certain issues to the administrative body for its views." Poultry Growers suggest that Plaintiff invoked application of primary jurisdiction when Plaintiff sought to obtain through ODAFF administrative warrants the same information which Plaintiff seeks through the Subpoenas in this case. Oklahoma County District Court has accepted jurisdiction over the appeal of the administrative issues raised by ODAFF's administrative warrants. As a result, this Court should defer any further proceedings on discovery under ODAFF's regulatory authority until such time as Honorable Judge Swinton resolves the pending declaratory action.

WHEREFORE, these Poultry Growers request that the Court deny Plaintiff's Motion to Compel Discovery. Alternatively, Poultry Growers request that the Court stay the Plaintiff's requests to sample the registered poultry growers' poultry houses and soils until the declaratory action in Oklahoma County is finally resolved.

Respectfully submitted,

s/ D. Kenyon Williams, Jr.

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ATTORNEYS FOR POULTRY GROWERS

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of May, 2006, a copy of the above and foregoing was sent via facsimile to the following counsel of record:

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and that an electronic version of the same was sent this date to the following:

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